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Law

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THE TAXATION OF UNREALIZED INCOME

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Doubtless no one would contend, even with the staccato definition of income of Eisner v. Macomber[1] fresh in his mind, that the federal Treasury can collect an income tax only in respect of actual cash receipts in hand paid. Surely income may be realized from the receipt of property as well as from the receipt of money.[2] Moreover, even a layman would be likely to concede that an income tax might properly be collected in respect of some amounts actually not received at all, such as the amount of interest coupons due and payable but as yet uncashed by the taxpayer. Upon the foundation of these accepted premises, the Treasury has erected a considerable structure of decisions imposing income tax liability with regard to amounts which the taxpayer did not receive, and in many cases could not have received, in cash, or even in property. It is the purpose of this article to consider the validity of some of these decisions which the Treasury has conveniently grouped under the heading of constructive receipt.[3]

I

1. The simplest cases of constructive receipt are those in which (1) the taxpayer is immediately entitled to money; (2) the money is immediately available to him;[4] and (3) his failure to receive it in cash is due entirely to his own volition. Thus amounts of salary accruing monthly to a taxpayer and available to him but actually not drawn, have been taxed to him as of the year in which they accrued.[5] In the same way, an uncashed dividend check,[6] and interest coupon,[7] have been considered income to the owner as of the time of receipt and of maturity respectively. Moreover, if the amount of the dividend, instead of being paid to the shareholder, is at his request applied against his notes held by the corporation,[8]

*This article appeared in 39 Harvard Law Review 82, and is reprinted with its permission and by courtesy of the author, who has kindly added citations and new material to bring it down to date.

(1) "After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (Stratton's Independence v. Howbert, 231 U. S. 399, 415; Doyle v. Mitchell Bros. Co., 247 U. S. 179, 185)—'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case (pp. 183, 185).

"Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. . . . 'Derived—from—capital'; 'the gain—derived—from—capital,' etc. Here we have the essential matter: not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived,' that is received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal;—that is income derived from property. Nothing else answers the description." 252 U. S. 189, 207 (1920).

(2) Peabody v. Eisner, 247 U. S. 347 (1918); Doerschuck v. United States, 274 Fed. 739 (E. D. N. Y., 1921).

(3) The articles of the United States Treasury Regulations 69 particularly pertinent to this discussion are 50-52. These articles, it will be found, are comparatively conservative in their claims for the revenues. The application of the regulations to particular cases has occasionally been more exacting against the taxpayer.

There is a valuable discussion of the question "When is Income Realized?" by Professor Thomas S. Adams in The Federal Income Tax (Columbia Univ. Lectures), 29-50.

(4) Cf. the cases discussed in Part III, infra.

(5) A. R. R. 4385, II-2 C. B. 81. (The cumulative bulletins, issued every six months by the Treasury Department, contain the published rulings of the Department. An explanation of the references made to them in this article will be found in the Introductory Notes to each bulletin.)

(6) I. T. 2072, III-2 C. B. 76. In the case presented to the Treasury, the recipient was incompetent, and the checks were not actually cashed until after his death; but it was held that the checks were to be considered as income to him as of the date of their receipt.

(7) U. S. Treas. Regs. 69, Art. 52. But the Treasury holds that a defaulted interest coupon is not income to the taxpayer until paid. U. S. Treas. Regs. 69, Art. 52; S. R. 1363, C. B. IV-I, 131.

(8) I. T. 1740, II-2 C. B. 82; I. T. 1666, II-1 C. B. 64. The same holding has been made where dividends, paid on stock deposited in escrow pursuant to a contract of purchase, were credited to the vendor as part payment of the price of the stock. See I. T. 1958, III-1 C. B. 111.

it is considered income to him, evidently as of the time of declaration.[9]

These decisions appear quite unobjectionable, even though the taxpayer is reporting upon a cash receipts rather than upon an accrual basis.[10] As a practical matter, it would be a curious result if a taxpayer might at his pleasure postpone the collection of income taxes against him by leaving his interest coupons unclipped or his salary undrawn.

On the other hand, the Board of Tax Appeals has led the way in preventing the undue extension of this doctrine to cases in which the amounts in question are not actually available to the taxpayer, although they have been credited to him on the books of the payor. The Board has held that commissions credited to an employee but not drawn and actually not available need not be reported until paid,[11] and that a salary check issued in 1918 but not received by the employee until 1919 constitutes income in the latter year.[12] Since each of these decisions has been acquiesced in by the Commissioner of Internal Revenue, the soundness of the Board's rule will not be questioned.[13]

(9) Cf. the decisions in United States v. Mellon, 279 Fed. 910 (W. D. Pa., 1919), aff'd, 281 Fed. 645 (3rd Circ., 1922), and United States v. Davison, 1 F. (2d) 465 (W. D. Pa., 1924), aff'd, 9 F. (2d) 1022,, cert. denied 46 S. Ct. 484. These cases each involve a dividend by the Gulf Oil Corporation in 1913. According to the facts as they appear in the Davison case, where they are most clearly set forth, the board of directors of the corporation declared a cash dividend of 100 per cent, and at the same time gave each shareholder the right to subscribe at par to two additional shares of stock for each one owned. Each of the defendants had agreed with the others in advance to indorse his dividend check back to the corporation in exchange for stock. It was held in both cases that the defendant was not taxable upon the cash dividend, since in reality he received it in stock. Cf. Appeal of Paul, 2 B. T. A. 150 (1925); Appeal of Zellerbach, 2 B. T. A. 1076 (1925); Appeal of Hunt, 5 B. T. A. 356, (1926). And see the discussion under Part III, infra.

(10) For a discussion of these two methods of computing net income, see, e.g., Montgomery, Income Tax Procedure 1927, 239 et. seq.

(11) Appeal of Maisel, 2 B. T. A. 66 (1925); Appeal of Englander, 1 B. T. A. 760 (1925).; Cf. Appeal of Greenbaum's, 2 B. T. A. 979 (1925).

(12) Appeal of Edmunds, 1 B. T. A. 998 (1925).

(13) Suppose a contractor sells municipal special assessment bonds to a broker at 90, 85 to be paid to him in cash, and 5 to be paid to a bank as security for the payment of interest on the bonds, collection of which the contractor guarantees. The Bureau has held that the sale price of the bonds is 90, to be considered as received in the year of sale, evidently on the theory that the provision for security was merely a collateral arrangement, similar to a pledge. I. T. 1788, II-2 C. B. 83. Cf. S. 1315, 2 C. B. 82. Quaere whether the Board of Tax Appeals would take the same view.

2. A slightly more difficult case is presented if the taxpayer is not immediately entitled to receive money, but instead receives a promise to pay money in the future. Suppose, for example, that a corporation distributes a dividend in scrip instead of cash. Two questions then arise: (1) is there any taxable income until the instrument is paid; and (2) if there is, how much is it? In view of the emphasis in the earlier revenue acts upon actual receipt as the test of income, it is not surprising to find a federal district court stating by way of dictum, with respect to the provisions of the 1913 Act:

"Actual receipt within the current tax year is a condition to the levy of the tax, by the terms of the act as construed by the courts. . . . If a seller accepts the notes of third persons in absolute payment, the rule would be different. But where the effect of the transaction is a mere promise to pay, and not an actual payment, it cannot be said to be income, until it has been actually received, and is not subject to be taxed as such until its actual receipt."[14]

Although the court apparently concedes that a note accepted in absolute discharge of an obligation must be accounted for in the year in which received, it emphatically denies such a possibility if the note has been taken in conditional discharge.[15] If it were true that no income ever arises until cash is received, the court's conclusion would be perfectly sound. But income may be realized from the receipt of property,[16] and a promissory note, no

(14) United States v. Christine Oil & Gas Co., 269 Fed. 458, 459 (W. D. La., 1920).

(15) A creditor may receive the debtor's negotiable instrument in full satisfaction of his simple contract obligation. However, unless the contrary clearly appears, the instrument will in most jurisdictions be deemed to have been received in conditional discharge; that is, until the instrument reaches its maturity, there is no right of action upon the debt. If it is then dishonored, the right of action upon the debt revives, and the instrument is held as security. 3 Williston, Contracts, § 1922.

(16) See cases cited in note 2, supra.

An interesting recent case involving the question of the receipt of income in property is Jones v. United States, 60 Ct. Cl. 552 (1925), where it was held that quarters assigned an officer of the Army did not constitute taxable income to him. The Treasury Regulations were changed to correspond with the decision, Cf. U. S. Treas. Regs. 65, Art. 33 with U. S. Treas. Regs. 69, Art. 33.

matter whether received in conditional or absolute discharge, is clearly property. Consequently there is at least the possibility of taxable income upon the receipt of the note, although it may be payable ten years later.[17]

If the note is to be taxed as income because it is property, it seems to follow that the amount of income will depend upon the market value rather than upon the face value or par of the instrument. To be sure the market value may also be the face value. But in each case, the real test should be—how much is this property fairly worth?[18]

II

In a second group of cases, which are far more troublesome to the Treasury and to taxpayers, the taxpayer is actually entitled to certain amounts of income at once, but the obligor refuses, at least for the time being, to pay. In some of them, a further complication is presented in the fact that the amount due is uncertain until finally determined by a court. There is again the possibility that the obligor admits liability to some limited extent. During the past few years, with recurrent tax reductions, taxpayers have been astute to postpone the date of realization of income as far as possible; during 1914-18, with increasing rates, the anxiety of taxpayers in some cases was to accelerate the realization. Consequently the Treasury and the taxpayer have changed sides from time to time, with some resulting uncertainty in the departmental decisions. The facts of two types of these cases presented to the Treasury may properly serve as a text for the discussion.

1. The Federal Control Act[19] authorized the President to enter into agreements with certain carriers under federal control to pay, as just compensation, an annual sum not in excess of the average annual railway operating income for the three years ended June 30, 1917. Provision was made for submission of claims to boards of referees in the event compensation was not so agreed upon, and finally for suits in the Court of Claims if the decisions of the boards were not accepted. The so-called "standard return" of the Interstate Commerce Commission seems to have been the minimum amount which the carriers might receive as just compensation.[20] Suppose, then, that a railroad was under federal control from January 1, 1918 until March 1, 1920, with no contract with the Director General of Railroads. Suppose that during 1918, it received from the Director General by way of compensation $5,000,000. In the same year, the Interstate Commerce Commission certified that its standard return showed $8,000,000. In 1921, a board of referees decides that $15,000,000 is just compensation for each year the railroad was under federal control. A settlement is made on that basis. How should the income be reported?

2. A corporation has accumulated a surplus largely in excess of its reasonable needs, with very large net earnings for the fiscal year 1918. Its board of directors refuses, upon the demand of minority stockholders, to declare more than a nominal dividend. The stockholders secure in 1919 a decree of a court of equity ordering a distribution of substantial dividends; upon appeal this decree is af-

(17) Article 1547, U. S. Treas. Regs. 69, provides: "Scrip dividends are subject to tax in the year in which the warrants are issued."

(18) To this effect, see Appeal of Wolfson, 1 B. T. A. 538 (1925), and U. S. Treas. Regs. 69, Art. 1547. See also Montgomery, Income Tax Procedure 1927, 388.

It has been forcefully urged that the gain or loss on an exchange of property should not be recognized unless the property received has a readily realizable market value. See 2 Nat. Income Tax Mag. 208 (July, 1924). See Revenue Act of 1921, § 202 (c), 42 Stat. 230. The 1924 and 1926 Acts, § 202 (c.), 43 Stat. 256, 44 Stat. 12, provide that the gain or loss is to be measured by the fair market value of the property received. Probably the strongest reason for the contention in favor of the readily realizable market value test has been the tendency of the Treasury in some cases to treat promises to pay as the equivalent of cash to the amount of their face value. If "readily realizable market value" is construed to mean that amount which a willing buyer will pay a willing seller in the market, a doubtful construction, then "fair market value" seems a more accurate phrase. If it means a forced sale value, is the actual income from the transaction being reported?

(19) Act of March 21, 1918, c. 25, § 1, 40 Stat. 451.

(20) See O. D. 642, 3 C. B. 231.

firmed in 1921. The dividends are actually paid in that year.[21] When should they be reported as income?

In either case, a layman's reaction no doubt would be that neither item of income, dividends or compensation, should be reported until it actually comes to hand. He might argue that the Treasury could not compel a return in 1918, when the amounts were wholly undetermined; that if the Treasury could not compel a return on the theory of constructive receipt at that time, the taxpayer could not compel the Treasury to accept one. However, if the amounts are reported when received, in addition to the other income received in due course during that year, the result will be a gross distortion of the taxpayer's income for that year, with a corresponding diminution of it for previous years. Even though the Treasury may not be able to compel a tax to be paid upon these items on the theory that they have been constructively received, until their amount and the liability for them has been fixed, does it follow that the taxpayer may not, when the amount is determined, file amended returns to correct the showing of income for past years?

The provisions of the Revenue Acts of 1924 and 1926 particularly applicable are Sections 212 and 213.[22] After defining gross income, Section 213 proceeds:

"The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of Section 212, any such amounts are to be properly accounted for as of a different period."

The portion of Section 212(b) which is pertinent follows:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. . . ."

Now it would seem that there is ample statutory authority in these provisions for the Commissioner to make the necessary adjustments in any case where the rigid employment of the taxpayer's usual method, cash receipts or accrual, will yield inequitable results. In the railroad case given above, although the railroad might accrue on its books as the minimum compensation the standard return certified by the Interstate Commerce Commission, it could hardly accrue the uncertain amount in excess which it later received. But if the excess amount awarded is reported, as the Treasury has frequently required,[23] in the year in which received, the effect will be that the railroad will report in a single return for 1921 $14,000,000 of income attributable to 1918 and 1919, as well as its usual income for 1921. If the rates applicable are graduated, as would be the case if the recipient were an individual, or if they are higher in 1921 than in 1918, the result may be a considerably heavier tax burden, without any delinquency whatsoever on the part of the taxpayer.[24] A much fairer solution seems to be for the Commissioner to permit the filing of amended returns in such cases, under the power given him in the statute.

The Treasury adopted this procedure, at least for a time, by its regulations un-

(21) Such a case is stated in A. R. R. 124, 2 C. B. 87.

(22) 43 Stat. 267, 44 Stat. 23. A similar provision has occurred in the Revenue Acts of 1921 (42 Stat. 238) and 1918 (40 Stat. 1065).

(23) See S. M. 1621, III-2 C. B. 72; S. M. 4171, C. B. IV-2, 147; I. T. 1212, I-1 C. B. 90. Cf. I. T. 1326, I-1 C. B. 91; S. M. 4236, C. B. IV-2, 149.

(24) An excellent example of the inequity of this result appears in O. D. 432, 2 C. B. 84. The compensation of a Federal official was withheld for several years pending settlement of a contested election. It was finally paid to him upon a decision in his favor. The Treasury held that the entire amount so paid should be reported as income for the year in which received. In other words, his opponent, by an unsuccessful election contest, succeeded with the aid of the Treasury in compelling him to pay normal taxes and surtaxes in excess of those which would otherwise have been due.

der the Revenue Act of 1918. Article 52 of Regulations 45 (1920 edition) provided in part:

"In view of the unusual conditions prevailing at the close of the year 1918, it is recognized that many items of gross income, such as claims for compensation under cancelled contracts, together with claims against contracting departments of the Government for amortization and other matters, while properly constituting gross income for the taxable year 1918 were undecided and not sufficiently definite in amount to be reported in the original return for that year. In every such case the taxpayer should attach to his return a full statement of such pending claims and other matters, and when the correct amount of such items is ascertained an amended return for the taxable year 1918 should be filed."[25]

The Treasury seems to have taken the view that this construction of the statute was superseded[26] by that part of Article 51 of Regulations 62, issued under the Revenue Act of 1921, which provided in part:

"Such items as claims for compensation under cancelled Government contracts constitute income for the year in which they are allowed or their value is otherwise definitely determined."

Although this later construction is doubtless more readily administered, the former construction certainly results in a more equitable statement of the taxpayer's income. Since the statute is sufficiently flexible in its provisions to permit the 1918 interpretation, it seems regrettable that the Treasury has not seen fit to preserve this possibility of relief for hard cases.

The final question in this branch of the discussion is when the permission to file amended returns should be granted, if at all. The objective of the statute is said to be a clear reflection of income. In the cases given, a liability to pay over an item of income existed in 1918, although the money was not obtained until later. Moreover, in theory at least, a definite amount was then due, not by way of damages for breach of a contract, but by way of performance of the terms of the obligation, although it was not determined until later. If there was actually no liability to pay in a particular taxable year,[27] there seems to be no basis for returning as of that year compensation paid in some later year, even for services performed in the first year. It is for this reason that the plaintiff in Jackson v. Smietanka[28] was properly denied the privilege of filing amended returns for 1913-1917

(25) For a case applying these provisions, see O. D. 816, 4 C. B. 93.

(26) I. T. 1489, I-2 C. B. 67; A. R. R. 1835, II-1 C. B. 59. However, Article 52, U. S. Treas. Regs. 45, has not been officially amended to omit the quoted sentence.

It is not clear that the Treasury has ever availed itself of the construction of the statute embodied in the quoted provisions of Article 52 to relieve taxpayers in hard cases. Rather the assertion has been made that the article was used in some cases merely to throw back into 1918, one of the highest tax years, amounts of income realized in 1919-21 by taxpayers who had lost money in those years of post-war adjustment.

An example appears in Appeal of Illinois Terminal Co., 5 B. T. A. 15 (1926), decided since the original publication of this article. There the taxpayer, which kept its accounts on an accrual basis, received in 1922 compensation for the use of its property by the United States in 1918, 1919 and 1920. In entered the amount on its books and reported it as income for 1922. The Commissioner acting under the authority of Sec. 212 (b) (quoted above) prorated the amount so received to the earlier years, and determined additional taxes of $65,878.19. The Board, six members dissenting, upheld the action of the Commissioner. The action of the Commissioner in this case is in apparent conflict with the published Treasury rulings cited in note 23. Since Sec. 212 (b) places the discretion as to this prorating in the Commissioner, it appears that the Commissioner may, if he chooses, exercise this discretion merely in such a way as to impose additional taxes, never to relieve from them in hard cases. Surely this would be a most unfortunate result.

(27) A plant of an American corporation in Germany was seized and operated by the German Government from 1917-19. In 1919, it was turned back to its original owners, together with compensaton for its use during the war. The Solicitor of Internal Revenue held that, since the German government was under no legal obligation to pay for its use, the compensation paid in 1919 was income for that year. S. R. 1996, III-2 C. B. 75. See also L. O. 1086, I-1 C. B. 87.

So, if a lawyer is to receive, upon the completion of certain services extending over several years, a lump sum as compensation, whether determined in amount or not, there seems to be no basis in the present statute for apportioning the sum over the years in which the services were rendered. There was no liability to pay in the earlier years; the lawyer then had no claim which could be considered as income to him.

(28) 272 Fed. 970 (7th Circ., 1921). Mr. Jackson accepted employment as a railroad receiver in 1913, under an order providing for compensation of $2,000 per month, with a further provision that at the termination of his trust he should "be at liberty to apply for such further compensation as to the court may then appear reasonable and just." He applied to the court from time to time for additional compensation, but was refused, until in 1918 he was allowed "as final payment for all services rendered by him during the receivership herein the additional sum of $100,000." Cf. Holbrook v. Moore, 293 Fed. 264 (E. D. Mo., 1921).

inclusive, in which he sought to report proportional parts of a payment received in 1918 for services rendered in 1913-1918. Moreover, if the amounts received are merely damages for a broken obligation, income appears to be clearly enough reflected if they are reported when received. But if the taxpayer can show a liability to pay a determinable amount in performance of some existing obligation, it seems he has made out a proper case for a return in that year of income subsequently paid.[29] Finally, in determining for what year the income should be reported, the Commissioner should base his finding solely upon a consideration of what will result in the most equitable statement of income, not at all upon a consideration of what method will result in the largest tax.[30] Sec. 212(b) was surely not intended to enable the Commissioner to penalize taxpayers at will.

III

In the two groups of cases considered above, the question is the time at which certain amounts of income should be taxed. In another group of cases, which have likewise been classified by the Treasury as involving the doctrine of constructive receipt, the question is rather to whom a given amount should be taxed as income. The common characteristic of these cases is that A has or has had control of the disposition of the income in question, and could have received it himself, but that, at the time of payment, B was legally entitled to and actually received it. The problem will become less cryptic if examples of three typical cases —the transfer of income to become due, the contract for the payment of income to a third party, and the creation of a revocable trust—are set forth.

1. Suppose that A, the owner of an unregistered bearer bond for $1,000, cuts off the interest coupons and gives them to B. He then gives the bond itself to C. B subsequently receives payment of the coupons as they mature; C receives the face of the bond upon its maturity. Who should return the income arising from the payment of the interest coupons?

The Treasury has steadily held that A must return and pay a tax upon assigned income, including interest coupons given another.[31] The principal reason advanced for this holding is:

"While the amount named in the assignment is never actually received by the donor, because of his ordering it to be paid to another, he admits his right of ownership by the very act of executing the assignment. The mere fact that it is received by his nominee, rather than by him, does not prevent its being his income."

This argument is hardly convincing. An admission of ownership of income months before its receipt is hardly conclusive as to its ownership at the moment of receipt, particularly when the evidence of ownership consists of an act or a document vesting all legal interests in the income in another. The time of receipt is certainly the time at which the income tax liability of these amounts must be determined, and at that time, the only individual having any legal interest whatever in the interest coupons is B.[32]

Although the Treasury's arguments may appear to be untenable, it will be

(29) This principle seems to have been recognized by the Treasury in S. M. 4236, C. B. IV-2, 149, which appeared after the original publication of this article. It has also been recognized by the Treasury in some cases where a liability to pay existed on March 1, 1913, the effective date of the first income tax act. Thus in O. D. 591, 3 C. B. 113, some of the taxpayer's property was listed for condemnation in 1906. It was not destroyed until 1917, in which year the taxpayer obtained a verdict for an award. Mandamus proceedings were instituted to obtain a settlement of the award, and in 1920, it was paid, with interest from 1906. Held, the measure of taxable income is the difference between the fair market value of the claim for the principal and interest on March 1, 1913, and the sum actually received. To the same effect, see United States v. Guinzburg, 278 Fed. 363 (2nd Circ., 1921).

Cf. the decisions as to the proper date for deductions for losses, collected in Montgomery, Income Tax Procedure 1927, 870.

(30) See the case in Note 26.

(31) See, among other decisions, O. 912, 1 C. B. 80; O. D. 120, 1 C. B. 84.

(32) The Treasury evidently gives greater significance in this connection to a moral or religious obligation than to a legal one. A clergyman who has taken a vow of poverty need not return for income tax purposes amounts received by him from his parishioners, which he turns over to the religious order of which he is a member, pursuant to his vow. O. D. 119, 1 C. B. 82.

advisable to examine other supporting theories, since these cases have not yet been passed upon by the federal courts. One possible factor in the determination of the cases, which does not seem to have been considered decisive by the Treasury, lies in the relationship between the transferor and transferee. Suppose, for example, that B is A's creditor, and the purpose of the transfer is to pay A's debt. If A accordingly receives a release of his debt after the interest coupons are paid to B, it is arguable that A has received income, regardless of what may be held in assignment cases generally. For A has obtained property of value to him, a cancelled obligation, which conceivably may be held to be income.[33] To be sure, it is a sort of negative income, but it requires no sixth sense to perceive that A may have derived a gain quite as great as if he had received the money directly.[34] Or suppose that B is A's wife, and the reason for the transfer is the normal one: to provide B with independent means to meet household or personal expenses. Since A is doubtless under some obligation to B to provide her with funds for her maintenance, it requires, perhaps, not too great a strain upon the legal concept of income to consider that the discharge of even this obligation constitutes a gain to A derived in property.[35] In other words, if the transferee is a creditor, and if the transfer is for the purpose of liquidating a debt, A is receiving something in exchange for the transfer, and that something may be considered income to him.

Suppose, however, that A and B are in no way related, legally or otherwise, at the time of the transfer; the coupons are transferred to B as a pure gift, and are actually paid to him. In this case, likewise, for the reasons already quoted, the Treasury has held that A must return and pay the tax upon the income. Probably this conclusion has been reached at least partly because of a belief that the income cannot be taxed to B, since he received it as a gift.[36] Hence, if it cannot be taxed to A, it entirely escapes taxation. We shall consider later a statutory provision designed to prevent tax evasion by the use of a device somewhat analogous to an assignment, but, as to the instant case, the statute is perfectly silent. Accordingly, if the income is taxable to A, it must be by virtue of the fact that it is legally his income, irrespective of any attempt at tax evasion. But the premise that the income is not taxable to anyone if it is not taxable to A is not particularly strong. The decision of the Supreme Court in Irwin v. Gavit[37] indicates that the gift of the income of a trust fund may result in taxable income to the donee. May not, therefore, the transfer by way of gift of the right to receive other income result in income to the donee?[38] The

(33) Cf. the case of the dividend used to pay a note due from the stockholder to the declaring corporation, note 8, supra.

(34) For an application of this principle, see Rensselaer & S. R. R. Co. v. Irwin, 239 Fed. 739, 748 (N. D. N. Y., 1917).

(35) For cases of this sort, in which the husband was held taxable on the assigned income, see Appeal of Mitchel, 1 B. T. A. 143 (1924); Appeal of Browne, 3 B. T. A. 826 (1926); I. T. 1339, I-1 C. B. 97; A. R. R. 2245, II-1 C. B. 61 S. M. 4892, C. B. V-1, 275. The Board was sustained in the Mitchel case in Mitchel v. Bowers 9 F. (2d) 414 (1925), 15 F. (2d) 287 (1926).

The cases of assignment of income by a husband to his wife, as in the last case just cited, of his share of partnership profits, have doubtless been considered by the Treasury as a rather obvious attempt at tax evasion. Arguably a partner should not be able to shift his income tax liability in respect of his share of partnership profits to his wife, while he retains the burden of earning those profits. However, if the assigned income, though not due at the time of the assignment, has already been earned, as it was in the second case cited, an assignment of commissions on renewal premiums by a life insurance agent, and if the assignment is bona fide and validly executed, does not the assignee acquire an independent ownership which must be recognized for tax purposes? If so, can the assignor validly be taxed upon such income when paid, unless some obligation of his is being discharged?

(36) Section 213(b) (3) of the Revenue Act of 1926, provides: "The term 'gross income' does not include the following items, which shall be exempt from taxation under this title: . . . (3) The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income)." Similar provisions have occurred in the earlier revenue acts.

(37) 268 U. S. 161, 69 L. Ed. 897, 45 Sup. Ct. Rep. 475 (1925).

(38) For a discussion of the extent of the income tax liability of the donee, see, in addition to the Gavit case, John M. Maguire, "Capitalizaton of Periodical Payments by Gift," 34 Harv. L. Rev. 20; John M. Maguire, "Income Taxes on the

Gavit case contains at least a strong *dictum* that it is not a condition precedent to the income tax liability of the donee that he have any interest in the fund or source from which the income arises.[39]

In any event, it is difficult to find the exact legal theory whereby it is conclusively established that income, the right to receive which is transferred in advance of receipt, still belongs for tax purposes to the donor.[40] Even in the case of a gratuitous assignment, which might have been revoked, if it was not, and the income was collected by B in his own behalf, how is it A's income? In the case we have discussed, the legal nature of the bond given C—a piece of negotiable paper payable to bearer—may be exactly the same as that of the interest coupons given B. Yet the Treasury holds that when B cashes an interest coupon, the amount of it is income to A, though when C receives payment of the bond, there is no income to A. To say that A has constructively received the amount of the interest coupons, although he has not constructively received the amount of the bond, is to substitute fiction for fact, to cover a lack of analysis with a convenient phrase.

Realization of Future Interests," 31 Yale L. J. 367; Roswell F. Magill, "The Income Tax Liability of Annuities and Similar Periodical Payments," 33 Yale L. J. 229.

See also S. O. 160, III-2, C. B. 60, holding that the entire amounts received by a donee beneficiary as an annuity under a matured insurance policy on a surviving donor's life, are taxable income of the donee.

(39) "It seems to us hardly less clear that even if there were a specific provision that A should have no interest in the corpus, the payments would be income none the less, within the meaning of the statute and the Constitution, and by popular speech. . . .

"The courts below went on the ground that the gift to the plaintiff was a bequest and carried no interest in the corpus of the fund. We do not regard these considerations as conclusive, as we have said, but if it were material a gift of the income of a fund ordinarily is treated by equity as creating an interest in the fund." 268 U. S. 161, 167.

(40) The cases of United States v. Mellon and United States v. Davison, digested in note 9, supra, support the proposition that income validly assigned in advance of its accrual or receipt is not taxable to the assignor. In both of these cases, it was possible for some of the shareholders to have received the dividends in cash; but since they agreed in advance not to so receive them, but to use them in paying for additional stock, they were held not taxable on the dividends.

2. The nearest analogy to these cases in which the Treasury has court decisions to support its position are cases of contracts for the payment of income to third parties. The latter cases,[41] with a single exception,[42] involved a lease of railroad property by Corporation A to Corporation B, in consideration of the payment of fixed amounts directly to the shareholders and bondholders of Corporation A, the amounts being usually denominated as "dividends" and "interest" respectively. The question in each case was whether amounts so paid to the stockholders and bondholders, which the lessor corporation never actually received, constituted income to that corporation. The leases had been consummated long before the passage of the Sixteenth Amendment, so that there was no question of tax evasion. The courts uniformly held that the lessor corporation realized income to the extent of the payments under the leases, although in some of the cases strong dissenting opinions were filed.[43] The theories advanced were various. The substance of the arguments which appear to have been prevailing is that the corporation and its stockholders are not really separate entities, but that the corporation is rather a business device employed by the stockholders for their profit; that the amounts paid to the stockholders are in substance paid to the corporation; that the payments to bondholders, being in discharge of an obligation of the lessor,

(41) Blalock v. Georgia Ry. & Elec. Co., 246 Fed. 387 (5th Circ., 1917); West End St. Ry. Co. v. Malley, 246 Fed. 625 (1st Circ., 1917), certiorari denied, 246 U. S. 671; Houston Belt & Terminal Ry. Co. v. United States, 250 Fed. 1 (5th Circ., 1918); Northern R. R. Co. v. Lowe, 250 Fed. 856 (2nd Circ., 1918); Rensselaer & S. R. R. Co. v. Irwin, 239 Fed. 739 (N. D. N. Y., 1917), aff'd, 249 Fed. 726 (2nd Circ., 1918), certiorari denied, 246 U. S. 671. See also Appeal of Am. Tel. & Cable Co., 2 B. T. A. 991 (1925); Am. Tel. & Cable Co. v. U. S. 61 Ct. Cls. 326 (1925).

(42) Houston Belt & Terminal Ry. Co. v. United States, supra, in which four railroads, owning all the stock of a terminal company, agreed to pay the interest on a loan to it. Held, that the amount of the interest payments is income to the terminal company.

(43) See West End St. Ry. Co. v. Malley, and Rensselaer & S. R. R. Co. v. Irwin, supra, note 41.

were therefore income to the lessor;[44] and that the amounts paid to stockholders could be recovered by the corporation if necessary to pay its debts.

In each case the beneficiary of the contract was an individual to whom the lessor corporation owed a definite obligation. Indeed the directors of the corporation could not, without exceeding their powers, have made mere gifts of its assets.[45] To be sure, stockholders are not creditors of the corporation; but nevertheless these payments were and could have been made to them only because of an existing duty to distribute to them corporate earnings and profits not needed for the prosecution of the business. It can properly be held, as has been stated above, that in obtaining the discharge of these obligations, the corporation received something of value which can be denominated as income to it.[46] But it is submitted that even though these cases are correctly decided, the decisions are not authority for the proposition that contracts for the payment of income to a donee beneficiary necessarily result in income to the person contracting for the payment.[47] In such a case, since no obligation of the donor to the donee is being discharged, the donor is obtaining nothing which is capable of evaluation as income. As the Solicitor of Internal Revenue originally argued,[48] the agreement is enforceable by the donee, nothing passes to the donor, and hence he actually receives no income. Surely the donor derives no gain from property, from labor, or from both combined, within the Supreme Court's definition. To say that he constructively receives the amounts paid the donee is again to substitute for the actual facts a fiction, convenient perhaps to the Treasury, but hardly secure from attack in the courts.

3. The Revenue Act of 1924 embodied two new paragraphs, appearing without change in the Revenue Act of 1926, whereby the income of revocable trusts, and of trusts the income of which may be used for the grantor's benefit in his discretion, or may be applied to the payment of premiums on his life insurance policies, is taxable to the grantor.[49] At the time

(44) However, in computing net income, the corporation would apparently be entitled to a deduction of at least a part of these amounts as interest paid.

(45) Cases are collected in 3 Cook, Corporations, 8 ed., 2678 n.

(46) The decision in United States v. Oregon-Washington R. & Nav. Co., 251 Fed. 211 (2nd Circ., 1918), to the effect that the forgiveness by a sole stockholder of the indebtedness due it from the corporation did not result in income to the corporation, does not appear to be in conflict with this view. Judge Hand's opinion was based upon the proposition that such a forgiveness of indebtedness was really a contribution to the capital of the corporation. The Treasury Regulations 69 make a valid distinction in stating (Art. 49): "The cancellation and forgiveness of indebtedness may amount to a payment of income, to a gift, or to a capital transaction, dependent upon the circumstances." In cases such as those considered in the text, the payments are rather clearly made in discharge of a liability to pay amounts which would ordinarily be income to the recipient.

(47) For another statement of this argument, see the excellent article by John M. Maguire, "Capitalization of Periodical Payments by Gift," 34 Harv. L. Rev. 20, 27.

Leslie v. Bowers, 293 Fed. 822 (S. D. N. Y., 1923), is sometimes cited for the proposition that a contract for the benefit of a donee beneficiary does not result in income to the party contracting for that payment. See Montgomery, Income Tax Procedure 1925, 503. It does not, however, seem to involve such a decision. A partnership agreed with one partner for good consideration that the partnership would continue to render services for X, and that the partner might arrange with X as he saw fit for commissions for such services. The partner then contracted with X to pay the commissions to various members of his family in stated proportions. The Commissioner levied an excess profits tax on the partnership in respect of these amounts. After paying the tax, members of the partnership sued the collector to recover it. The court denied a motion by the collector to dismiss, on the ground that the commissions were not income of the partnership. Apparently the court had no occasion to decide whether the amounts were income to the partner.

(48) A. R. M. 177, I-2 C. B. 57. In Mim. 3040, II-1 C. B. 48, it is stated that the facts were incorrectly set forth in A. R. M. 177, and it is held that if A agrees to work for B, in consideration of a sum to be paid C, A constructively receives this amount. Although Mim. 3040 does not purport to overrule A. R. M. 177, the holding is directly contrary to the reasoning of the earlier ruling.

(49) Revenue Act of 1924, § 219 (g), (h): "(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

"(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor." 43 Stat. 277.

For a discussion of these provisions, see Roswell F. Magill, "Notes on the Revenue Act of 1924," 24 Col. L. Rev. 836, 858.

these sections were proposed in the original Treasury draft of the bill, it was stated that (1) "the creation of a revocable trust constitutes nothing but an assignment of the right to receive future income" and "the income of such a trust should be included in the income of the grantor"; (2) "trusts have been used to evade taxes by means of provisions allowing the distribution of the income to the grantor or its use for his benefit. The purpose of this subdivision of the draft is to stop this evasion."[50] Apparently, then, these paragraphs are a statutory application of the principle of constructive receipt to particular cases. Consequently the utility of these provisions and their validity is within the scope of this discussion.

In the first place, it will be noted that the effectiveness of these provisions is very much restricted by the requirement that the grantor possess the power alone or in conjunction with a person not a beneficiary of the trust. If the grantor is willing to exercise the power in conjunction with a beneficiary, that is, if he can find any such person whom he can trust to join him in exercising the power as he may desire, he can completely circumvent the statutory provisions. Again, Treasury Regulations 65 and 69 provide, in Article 347, that if the grantor relinquishes the power of revocation during the taxable year, the income of the trust shall be taxable to him only for the period during which he had the power. A logical corollary of this proposition would be that if the grantor had the power for only part of the year, then the income should be taxable to him only for such part. So to hold, however, would be to fly in the face of the words of the subdivision. Finally, it would seem that the effect of subdivision (g) at least could be avoided by the creaton of an irrevocable trust for a brief period, which would very possibly serve the same purpose as a trust with a power of revocation.

The final question is whether, assuming that the present provisions are not wholly effective, they are nevertheless valid. The subdivisions apparently apply to trusts created long before the passage of the act, when tax evasion could not have been considered. But even if the statute were applicable only to trusts created after its enactment, and was enacted solely to prevent escape from the tax, it is a commonplace that Congress cannot constitutionally designate some amount as income to an individual, unless it is such in the opinion of the Supreme Court.[51] It may be granted, perhaps, that the income of a trust used to pay premiums on the grantor's life insurance policies may properly be taxed to the grantor, on the theories already discussed. In most cases, the fact would probably be that an obligation of the grantor was thereby being discharged. Again, if the income of the trust is, at the grantor's orders, distributed to him or accumulated for future distribution to him, there seems to be no difficulty in taxing it to him.[52] But suppose that the grantor has a mere power to revest in himself title to a part of the *corpus* of the trust[53] which he does not exercise; and that, accordingly, the income of that part of the trust is paid to X, pursuant to the terms of the trust deed. It is well settled that the validity of a trust is not

(50) "Statement of the Changes made in the Revenue Act of 1921 by the Treasury Draft and the Reasons Therefor," prepared by A. W. Gregg (now General Counsel, Bureau of Internal Revenue), at p. 44. The paragraphs as finally enacted differ somewhat in wording from the original draft; the explanation of their purpose in the committee reports is substantially that quoted. See Report of the Ways and Means Committee, House Report, No. 179, 68th Cong., 1st Sess., 21; Report of the Finance Committee, Sen. Report, No. 398, 68th Cong., 1st Sess., 25.

(51) For example, Congress has attempted unsuccessfully to tax as income stock dividends, Eisner v. Macomber, 252 U. S. 189 (1920), and the salaries of federal judges, Evans v. Gore, 253 U. S. 245 (1920); Miles v. Graham, 268 U. S. 501. (1925.)

(52) A taxpayer could conceivably object to being taxed on amounts accumulated for future distribution to him until the year of distribution. However, since the grantor might have had such amounts paid to him at once, the case is perhaps not different in principle from that of the uncut interest coupons considered supra, I.

(53) It will be noted that the language of the paragraph is not as broad as that of Section 302 (d) of the statute, dealing with the inclusion of the corpus of revocable trusts in the estate of the grantor. 43 Stat. 304, 44 Stat. 71.

affected by the fact that it contains a power of revocation.[54] In the absence of an actual revocation, such a trust is enforceable by the beneficiary.[55] Since revocable trusts were a well-recognized and perfectly valid legal device long before the adoption of the revenue acts, they can hardly be disregarded for tax purposes. The fact that a power is reserved by the grantor whereby he may revest in himself the income for 1926 and following years is scarcely a conclusive showing that the 1925 income, actually paid to X, pursuant to the deed, belongs to the grantor. Granted that the creator of the trust might have had the 1925 income himself had he so chosen, he did not so choose, and it is difficult to find a satisfactory theory for substituting the Congressional volition for his. If the Treasury's conclusions in the cases of income transferred to one to whom the transferor owes no obligation, and of income validly contracted to be paid to a donee beneficiary, are correct, then the provisions of Section 219 (g) are very possibly constitutional, for the same theory seems to underlie the three cases. If the conclusions in those cases are incorrect, it will be difficult to find a sound basis for taxing to the grantor the income of a revocable trust actually paid to X.

IV

The constructive receipt cases are an interesting example of the extent to which a doctrine, sound in its origin, may be stretched to cover a great variety of doubtful cases by guardians of the revenue who are assiduous to prevent the minimizing of taxes. The crystallization of the doctrine, in one of its furthest extensions, into legislation, will at least focus attention upon the validity of the theories behind it.[56] Particularly in view of the possibility of tax reduction offered by these legal devices which the Treasury and Congress has discountenanced, the ultimate fate of the statutory provisions and of the cases is important to the taxpayer and the Treasury alike.

(54) See, e.g., Jones v. Clifton, 101 U. S. 225, 229 (1879); Stone v. Hackett, 78 Mass. 227 (1858). See Perry, Trusts, 6 ed., § 104; Bogert, Trusts, 250.

(55) See the cases cited in note 54, supra, and Schreyer v. Schreyer, 101 App. Div. 456, 91 N. Y. Supp. 1065 (1905), aff'd, 182 N. Y. 555, 75 N. E. 1134 (1905).

(56) See Montgomery, Income Tax Procedure 1927, 703 et seq.

EDITORIALS AND COMMENTS

DARROW ON PROHIBITION

In the March number of Vanity Fair there is an article by Clarence Darrow entitled "Tyranny and the Volstead Act; The Futility of Enforcing Laws Which Are at Variance with the Life of the People."

He says that the prohibition law "is an imposition upon individual freedom," "is Tyranny masquerading under the disguise of Law," and urges that it cannot be enforced and should not be enforced, although he contends that "It is obvious that the Eighteenth Amendment cannot be repealed." Without expressly saying so, his statements give one a very definite impression that he advocates disobedience of the prohibition laws, on the theory that even without being repealed "they are already dead," because they are not "a part of the life of the people." He does pointedly ask the question, "Is there not a way of ridding ourselves of the prohibition law without changing the Constitution and without repealing the Volstead Act?" And the above seems to be his answer in the affirmative.

Conditions may be as bad as he so vividly depicts, but the course he seems to suggest is at least preposterous. The Eighteenth Amendment can be repealed, and, if the majority so wills, it should be. Until repealed it must be obeyed. To contend otherwise is an admission that our constitutional government is a failure. And we know it isn't.

AMERICAN?

In a recent habeas corpus case it is said:

"It is settled that, when a person attempts to enter this country through the official immigration channels, and claims the right to enter on the ground that he is an American citizen, he is not entitled to have his claim determined in a judicial proceeding, but may be denied admission by the immigration authorities, and the courts have no authority to interfere, provided he has had a fair hearing, and the findings of the immigration officials are supported by the evidence, and no erroneous rule of law has been applied." U. S. v. Brough, 16 F. (2d) 493.

This broad assertion is undoubtedly accurate as applied to an "American citizen" who is a citizen of Canada, Mexico or one of the South American governments.

Judge Thompson of the Illinois Supreme Court convincingly attacks bureaucracy in an article in the Kiwanis Magazine for February. It is entitled "Dangerous Tendencies in Government; Emphatic Comments with Specific Instances on How the Abolishing of State Autonomy and Development of Bureaucracy Mean Destruction of Individual Liberty." His frank and vigorous style may be judged from this:

The people of the several states should not permit themselves by coercion or bribery to be stripped of their right to regulate their own affairs. They should demand that the servants chosen by them to run their national government resist the importunities and threats of the gang of professional lobbyists to burden the government at Washington with local problems. The fact that something advantageous to the people ought to be done is no reason why the national government should do it. By uniform state laws we can properly promote the general welfare of all the people of this great commonwealth without the destruction of our liberty by the setting up of an irresponsible, autocratic, centralized government directed by bureaus and commissions.

Shades of Samson! A California court holds that it is not mayhem to forcibly "bob" a woman's hair.

"The company not only has the power, but the righteous right, to contract with any person it pleases . . ." 16 F. (2d) 464. The expression is used evidently in contradistinction to "wrongful right"—or is it "wrongful wrong?"

RECENT CASES

PROMISSORY NOTE CONTAINING REFERENCE TO CONDITIONAL SALE HELD NOT NEGOTIABLE.

The note involved read:

$2,452 50/100 Boston, Mass., Sept. 1, 1921

Thirteen months after date I promise to pay to the order of Campbell Electric Co., Lynn, Mass., twenty-four hundred fifty-two and 50/100 dollars. Payable at Old Colony Trust Co., Boston.

This note, one of a series of notes, having been given to said Campbell Electric Co., as per contract for certain apparatus, it is hereby agreed that the ownership and title to said apparatus remain in said Campbell Electric Co., until this note is fully paid; and that in event of default in payment of any prior note of said series, this note shall, at the option of the holder thereof, become immediately due and payable. It is further agreed that I will pay all costs, expenses and attorney's fees in case of suit on this note.

Value received with interest. At 8%.

No. 12 Due Oct. 1, 1922.

Edgar G. Hubbel,
39 Bay State Rd., Boston.

The Supreme Court of Massachusetts held, in Central Natl. Bank v. Hubbel, 154 N. E. 551, that this was not negotiable because not "an unconditional promise to pay" as required by law to constitute a promissory note. The court said:

The instrument in the case at bar is, in substance and effect, a conditional sale of "certain apparatus" to which reference is made and title to which is to remain in the Campbell Electric Company until paid for in full. There is the further statement that "this note is one of a series" given to the Campbell Electric Company "as per contract for certain apparatus." These words in conjunction with the rest of the instrument import a reference to the contract and render the promise contingent upon its fulfillment. . . . .

While the common law prevailed, the question arose whether an instrument was a promissory note when phrased in these words:

> "Received of T. S. Sloan, this day, roan horse known as A. M. Brown horse for which I promise to pay T. S. Sloan or order eighty-five dollars one month from date, at the Leicester ———, said horse to be and remain the entire and absolute property of the said Sloan until paid for in fully by me."

It was held that it was not a promissory note. Sloan v. McCarty, 134 Mass. 245. We are unable to perceive any difference in legal substance between the instrument then before the court and the one here presented. Since the definition of a promissory note was the same when that decision was rendered as that of a negotiable instrument now established by statute, so far as these facts are concerned, it

is impossible to make any sound distinction between that case and the one now at bar. We are not prepared to overrule the earlier decision, and regard it as binding. The Negotiable Instruments Law affords no ground for reaching any different conclusion from that reached before it was enacted. See Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525.

This conclusion is supported by Worden Grocer Co. v. Blanding, 161 Mich. 254, 257, 126 N. W. 212, 20 Ann. Cas. 1332; Reynolds v. Vint, 73 Or. 528, 144 P. 526; South Bend Iron Works v. Paddock, 37 Kan. 510, 15 P. 574; Fleming v. Sherwood, 24 N. D. 144, 148, 149, 139 N. W. 101, 43 L. R. A. (N. S.) 945; Polk County State Bank v. Walters, 145 Minn. 149, 176 N. W. 496.

STATUTE MAKING INSURER LIABLE TO ONE RECOVERING JUDGMENT AGAINST INSURED, HELD NOT APPLICABLE TO HUSBAND'S JUDGMENT FOR LOSS OF SERVICES OF INJURED WIFE.

The Ohio statute is as follows:

Sec. 9510-3. In respect to every contract of insurance made between an insurance company and any person, firm or corporation by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage such person, firm or corporation is responsible, whenever a loss or damage occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage or death occasioned by such casualty. No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured, after the said assured has become responsible for such loss or damage or death, and any such cancellation or annulment shall be void.

Sec. 9510-4. Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, if the defendant in such action was insured against loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in a legal action against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment.

This statute was adopted from Massachusetts. In New Amsterdam Casualty Co. v. Nadler, 154 N. E. 736, the Supreme Court of Ohio holds that the statute does not make the insurer liable on a judgment for loss of services sustained by the judgment creditor's wife; that the statute applies only to "bodily injury or death," and that loss of services does not come within these terms. The court does not attempt to discuss the question on principle, but merely follows the Massachusetts decision to the same effect, in Williams v. Nelson, 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538.

BOOK REVIEW

GILBERT'S COLLIER ON BANKRUPTCY. By Frank B. Gilbert. Albany, N. Y. Matthew Bender & Co. 1927. pp. xxxix, 1614.

The four-volume 13th Edition of Collier on Bankruptcy, published in 1923, is well and favorably known to the profession. The present single-volume edition is published to meet the demand for a new comprehensive work in one volume embodying the changes made by the 1926 amendments and many important recent cases.

The commendable arrangement and plan of the book deserve notice. There is a separate subdivision devoted to each section of Bankruptcy Act. Each such subdivision consists of (1) the text of the particular section of the Act, (2) references to analogous provisions in previous Acts, and also in the English and Canadian Bankruptcy Acts, (3) cross references to other provisions of law, to the general orders, to the official forms, and to the supplementary forms, (4) a complete synopsis or topical analysis of the text materials to follow, and (5) the discussion itself appropriately arranged and classified, with citations and footnotes.

Following the above, which covers over a thousand pages, are set out the General Orders in Bankruptcy, with cross-references and classified annotations. The Official Forms, to which have been added numerous Supplementary Forms, are printed in the back of the volume. There is a detailed and well arranged General Index to the entire volume.

The whole book has been set new and printed from new type. It includes the numerous changes made by the amendments of 1926, which affect more than 30 sections and sub-sections of the Bankruptcy Act, and are the most important that have been made since the present Act was passed in 1898. The reasons for these amendments, as stated in the report of the Committee of the American Bar Association, are given in the notes.

It certainly should answer the demand for a new comprehensive one-volume work on Bankruptcy, complete in itself. The printing and general make up is exceedingly well done, and every effort seems to have been made to make it complete, accurate and up-to-date. The law of Bankruptcy in this handy and accessible form will undoubtedly be well received by the profession.

DIGEST OF IMPORTANT DECISIONS

The name of the state is printed in bold face type to enable you to select cases from any particular state. The cases from the National Reporter System are copyrighted by the West Publishing Co., St. Paul, Minn., from whom a copy of any such decision may be obtained for 25 cents.

APPEAL AND ERROR

Where evidence necessary to sustain a verdict for plaintiff has been erroneously excluded upon the objection of defendant, the defendant cannot successfully complain that the verdict is not sufficiently sustained by evidence for want of such evidence.. Truschel v. Rex Amusement Co., 136 S. E. 30, **W. Va.**

APPEARANCES

General appearance of Director General of Railroads in actions to enforce reparation awards of Interstate Commerce Commission constituted general appearance as to all carriers involved, and could not be limited by him to certain carriers. World Pub. Co. v. Davis, 16 **F.** (2d) 130

BROKERS

Where vendor, plaintiff in action for accounting, employed defendants, brokers, to sell realty and they, through dummy transaction, sold land to corporation of which one of defendants was head, holding all stock for beneficial interest of fiancee, sale was voidable at plaintiff's option, defendants not having made full disclosure. That brokers acted in good faith, that terms obtained were best available, and that the wrong, if any, was not accompanied by damage to plaintiff, held immaterial; there having been no disclosure of true facts surrounding transaction to principal. Wendt v. Fischer, 154 N. E. 303, **N. Y.**

CARRIERS

Where woman slipped on banana peeling on street car and was injured and street railroad kept her on car for several hours before taking her to hospital, it was liable for damages resulting from detaining her on car, even though its negligence did not cause fall. San Antonio Public Service Co. v. Wellman, 288 S. W. 582, **Tex.**

COMMERCE

Bus company may not evade Mass. statute, regulating operation of motor vehicles for hire, by merely linking intrastate transportation to its interstate, or by unnecessary transportation of both classes by means of same instrumentalities and employees. Interstate Busses Corporation v. Holyoke St. Ry. Co., 47 **Sup. Ct.** 298.

Pennsylvania statute requiring license to sell steamship tickets or orders for transportation to or from foreign countries, held invalid, as constituting a direct burden on foreign commerce, as applying to agent of steamship companies authorized to sell tickets and transportation orders on steamships operating between United States and Europe. Di Santo v. Commonwealth of Pennsylvania, 47 **Sup. Ct.** 267.

BANKRUPTCY

A referee is without power by an ex parte order to stay a suit against the bankrupt by one not a party to the proceedings pending in a federal court of another district, though he may authorize the trustee to apply to that court for a stay. In re Music Master Corporation, 15 **F.** (2d) 860.

CONSTITUTIONAL LAW

Statute prohibiting more than one agent of a fire insurance company in each town, offends due process and special privileges clauses of Constitution. Franklin Fire Ins. Co. v. Montoya, 251 Pac. 390, **N. Mex.**

Initiated measure enacted by vote of the people which required courts to try certain cases within 10 days after answer filed, and required appeal within 10 days after judgment, and authorizing judge to hear and decide causes in county other than where suit pending, held, usurpation of judicial powers and void being unconstitutional. Atchison, T. & S. F. Ry. Co. v. Long, 251 Pac. 486, **Okla.**

Oregon Cosmetic Therapy Law, defining cosmetic therapy as including massage, removing superfluous hairs, manicuring, arranging, dressing, curling, etc., the hair of any female, and prohibiting persons from following any one of such occupations without being qualified in all, as applied to persons expert only in waving the hair of females and earning their living thereby, held violative of due process clause. Baker v. Daly, 15 **F.** (2d), 881.

CONTRACTS

A, who owned land, contracted with B to build a house on it, and contract required house to be painted. B contracted with C to do the painting. After C had begun painting, A, by intimidations, prevented C from completing his painting contract, and B did nothing toward persuading or compelling A to permit C to perform. C sued A and B jointly to recover as damages the profits he would have made by performance. Held, plaintiff entitled to recover against both for wrongfully preventing performance. Kroop v. Scala, 135 Atl. 501, **N. J.**

COPYRIGHT AND LITERARY PROPERTY

Medium, who in psychic seances did spirit writing, held entitled to copyright thereon. Cummins v. Bond, 1927, 1 Ch. 167, **English.**

CORPORATIONS

That foreign corporation was authorized to do business in New York held to justify inference that it was doing business within state, so as to give court jurisdiction of action against it. Bloom v. Wrought Iron Novelty Corporation, 219 **N. Y.** Supp. 92.

Contract for purchase of automobile by corporation, which had not filed a copy of its articles of incorporation in office of clerk of county in which it transacted its principal business, as required by statute, held illegal and void, though statute does not prescribe penalty for violation, nor expressly declare any business transacted before fulfillment of its requirements void; it having been passed for protection of public; not as revenue measure. Midwest Air Filters Pacific, Inc. v. Finn, 251 Pac. 340, **Cal.**

CRIMINAL LAW

Where sentence after plea of guilty was indefinitely postponed, in order that defendant might be used as witness in case against codefendant, and after continuance of case until next term no further order was made until after five terms of court, jurisdiction of court to impose sentence was lost. Mintie v. Biddle, 15 **F.** (2d) 931.

In prosecution of one drawing check which was refused for insufficient funds for felony for obtaining property under false pretenses, statute held improper, as statute making passing check with insufficient funds a misdemeanor excludes this subject from operation of section covering false pretenses. State v. Marshall, 211 N. W. 252, **Iowa.**

DAMAGES

Recovery may be had for death of dog struck by train without having had dog assessed for taxation, since failure to assess does not prove dog was of no value. Missouri Pac. R. Co. v. Green, 288 S. W. 908, **Ark.**

In action by tenant against landlord for constructive eviction by placing negroes in part of building having common toilet, tenant could recover damages for mental anguish, limited to plaintiff's mental distress, including humiliation to him from position in which family was placed. Wyatt v. Adair, 110 So. 802, **Ala.**

DIVORCE

Failure to pay alimony decreed by court is fundamentally contempt of court's decree. Ex parte Asadoorian, 135 Atl. 323, **R. I.**

Where misconduct of spouse has been condoned, subsequent misconduct, to revive former grievance, must amount to more than slight acts of unkindness, but need not be of same class or character as that condoned, nor sufficient to form independent ground for divorce. Young v. Young, 154 N. E. 405, **Ill.**

EXECUTORS AND ADMINISTRATORS

Though plaintiff's claim against estate under mortgage was not filed within 12 months' period required by statute, its presentation would be permitted in view of circumstances indicating reasonable lack of knowledge that debtor was dead. Great Western Ins. Co. v. Theede, 211 N. W. 234, **Ia.**

FORGERY

Charge of "forgery" of signature must be sustained by proof that signature was not made by hand of person whose signature it purports to be, and that it was made by another wrongfully. Proof that name appearing as consignee's indorsement on bills of lading attached to drafts was written by same hand that signed consignor's name, held not to sustain charge that consignee's name was forgery, in view of evidence that consignee was fictitious person, and that consignor used such name for his own purposes. American State Bank of Omaha, Neb. v. Mueller Grain Co., 15 **F.** (2d) 899.

GAMING

The fact that a slot machine always pays the player the value of his money in chewing gum does not exclude it from the operation of the anti-gambling law. State v. Apodoca, 251 Pac. 389, **N. Mex.**

HIGHWAYS

The state, under its police power, has right to prohibit use of highways for private business, or to grant right to one and refuse it to another. Harrison v. Big Four Bus Lines, 288 S. W. 1049, **Ky.**

INTOXICATING LIQUORS

That defendant in charge of place for sale of nonintoxicating beverages held bottle of liquor in his hand a short time upon another's handing it to him with statement, "Look what I have found," did not constitute "unlawful possession," Miller v. State, 211 N. W. 278, **Wis.**

Where intoxicating liquors are seized in the search of a dwelling house, and the search warrant is afterwards quashed, the property should in general be returned to the parties from whom taken, without further proof in their behalf. Dickhart v. United States, 16 **F.** (2d) 345.

Indiscriminate seizure of incriminatory documents held not warranted, under search warrant authorized by National Prohibition Act, describing property seizable as liquor, containers thereof, and property designed for manufacture. United States v. Kirschenblatt, 16 **F.** (2d) 202.

LANDLORD AND TENANT

White tenant, who left premises because part of building having common toilet was leased to negroes, could recover damages against landlord for constructive eviction, and for mental anguish caused by humiliation to himself and family, though no express agreement was violated, in view of established custom not to rent building partly occupied by whites to negroes. Wyatt v. Adair, 110 So. 801, **Ala.**

Where furniture store rented display space to corporation furnishing radios and sales force under contract, providing former was to receive 20 per cent of net sales in lieu of rent, but latter was to retain title, store could not retain possession of radios in order to satisfy claim for damages under contract. Buckingham Radio Corporation v. Persion Furniture Co., 211 N. W. 269, **Wis.**

LIABILITY INSURANCE

"Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-

examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question.'' Jessup v. Davis, 211 N. W. 190, **Neb.**

LICENSES

From common knowledge, Wisconsin real estate brokers' board was bound to look with some suspicion on companies dealing in Florida real estate, and properly required a financial statement of applicant for broker's license to sell Florida real estate. State ex rel. Durham Tropical Land Corporation v. Wisconsin Real Estate Brokers' Board, 211 N. W. 292, **Wis.**

LIFE INSURANCE

Insured in application for insurance made false representations concerning medical treatment. After policy was issued, he sustained and died from accidental injuries. Insurer did not discover falsity until after death. Held, in suit at law, that beneficiary could not recover. Judgment for plaintiff reversed. Aetna Life Insurance Co. v. Kimble, 16 **F.** (2d) 214.

MASTER AND SERVANT

Defendant was driving a wagon loaded with bags of sugar, and one of defendant's employees happened to be walking behind on his way home. The plaintiff a twelve-year-old boy, was walking along the highway and placed his hand on one of the bags in the wagon. Defendant's employee walking behind, thereupon slapped plaintiff on the back of the neck causing plaintiff to fall forward and he was injured by the wagon. Held that the employee honestly although erroneously believed that plaintiff was attempting to steal sugar, that the employee had implied authority to make reasonable efforts to protect defendant's property, that the employee's conduct was negligent but not so violently excessive as to take the act out of the scope of his authority, and that defendant was liable. Poland v. Parr, 1927, 1 K. B. 236, **English.**

MORTGAGES

Where execution of note and deed of trust are induced by fraud in factum, they do not exist in contemplation of law, and innocent holder cannot recover on them. If note and deed of trust are induced by fraud in treaty, innocent holder can recover amount properly disbursed by it. Parker v. Thomas, 136 S. E. 118, **N. C.**

MOTOR VEHICLES

Statute providing for vehicles turning to right, held not to require driver well on right side of road to still farther turn to right to avoid accident, statute only requiring driver to ''seasonably'' turn to right. Loehr v. Crocker, 211 N. W. 299, **Wis.**

In action for injuries, where one, instructing driver, might, on seeing plaintiff, have prevented accident by taking control of car or stopping or diverting it before accident, evidence of instructor's negligence held for jury. Opecello v. Meads, 135 Atl. 488, **Md.**

Indictment for involuntary manslaughter, charging that defendants ''erroneously, violently, wantonly, recklessly, and negligently did strike, hit, and beat him, the said (deceased), with an automobile,'' held not defective for want of precision and definiteness. The owner, who put automobile in immediate control of a careless and reckless driver, and who sat by his side and permitted him without protest to so negligently operate the car as to cause the death of another, held liable as ''principal'' with the man at the wheel. Story v. United States, 16 **F.** (2d) 342.

MUNICIPAL CORPORATIONS

City having acquired town hall, held it as in trust for benefit of inhabitants and had no power to sell it, in absence of expressed legislative grant, where there was continued need for hall and new one was not to be established. Drexler v. Commissioners of Town of Bethany Beach, 135 Atl. 484, **Del.**

City must exercise reasonable care to maintain street at cross-walks reasonably safe for pedestrians to cross, even as to condition caused by ice or snow; but the difference between sidewalks and cross-walks is to be considered. Ritter v. City of Shelton, 135 Atl. 535, **Conn.**

PHYSICIANS AND SURGEONS

In action against surgeon for death of plaintiff's 19-year-old-son because of use of cocaine as local anesthetic, defendant's and another physician's testimony that use of ether as anesthetic might cause death, if thymus gland were still persistent, held admissible on issue of cause of death, though there was no evidence that such gland was persistent, where plaintiff refused to permit post mortem examination. Bishop v. Shurly, 211 N. W. 76, **Mich.**

REMOVAL OF CAUSES

Under law of California, a railroad liable under doctrine of respondeat superior for negligence of its servant is not a joint tort-feasor as affecting right to removal on ground that complaint states a separable cause of action. Stephens v. Southern Pac. Co., 16 **F.** (2d) 288.

SPECIFIC PERFORMANCE

Where contract is to sell tract of 282 acres, it will not be specifically enforced against vendor to the extent of the 40 acres only to which he has title, especially where, at time of acceptance, acceptor knew of the deficiency in title. Chapman v. Lott, 110 So. 793, **Miss.**

Lessee, after making improvements, held entitled to specific performance of covenant to sell at an agreed price, ''on terms to be agreed upon,'' as against objection that covenant was unenforceable for indefiniteness, and landlord held bound to agree on reasonable terms, and not arbitrarily refuse to proceed with sale. Morris v. Ballard, 16 **F.** (2d) 175.

TELEGRAPHS AND TELEPHONES

Recovery against telegraph company by addressee of undelivered telegram held barred by noncompliance with condition, on back of blank on which original message was written, that written claim for damages must be presented within 95 days after cause of action accrued, though defendant's employee wrote message on blank; and plaintiff's charge and complaint of negligence and defendant's employee's memorandum thereof was not "claim for damages." Western Union Telegraph Co. v. Vann, 288 S. W. 541, **Tex.**

VENDOR AND PURCHASER

Where, before any acceptance of offer to sell, purchaser learned that vendor had title to only small part of tract offered, purchaser is not entitled to damages for breach. Chapman v. Lott, 110 So. 793, **Miss.**

WAREHOUSEMEN

Failure to have watchman at warehouse on Saturday afternoon and in daytime on Sunday, and to have all windows and storeroom in which valuable silks were stored connected with burglar alarm system, connected with outside gong, held negligence, contributing to burglary; care required of warehousemen in guarding against burglary depends on circumstances of each case, and testimony as to custom of other warehousemen not to employ watchman in daytime on Saturday afternoon or Sundays was properly excluded in action for loss by burglary of goods stored. Hodell v. Tower's Stores, Inc., 218 N. Y. S. 561, **N. Y.**

WILLS

Where aged and infirm person makes disposition of property under circumstances that arouse suspicion and in such way as to inflict injustice on heirs, one profiting by such disposition has burden of showing that it was untainted with undue influence or fraud. Weaver v. Weaver, 211 N. W. 130, **Wis.**

WITNESSES

A witness may not use a copy of a record when testifying, but must, if possible, produce the original of which opposing counsel may demand an inspection. Permitting witnesses, who had made memoranda of transactions when they occurred, to use notes recently made from such memoranda when on the stand, by referring to the same for facts which they could not otherwise remember, held error. Jewett v. United States, 15 **F.** (2d) 955.

In action to rescind policy for false representations in application as to applicant's physical condition, no unfavorable inference can be drawn from insured's exercise of privilege as to testimony of physicians. Travelers' Ins. Co. v. Pomerantz, 218 N. Y. Supp. 490, **N. Y.**

A witness who desires to claim his constitutional privilege of declining to answer a question, on the ground that the answer will tend to criminate him, must make his claim in person, and under the sanctity of his oath, and his attorney cannot claim it for him. He must also swear that the answer would tend to incriminate him. State v. McKay, 211 N. W. 435, **N. D.**

Defendant in prosecution for murder denied killing, presence at scene, and any knowledge of, or connection with the crime. Witness for defendant testified as to facts showing that defendant could not have committed crime, and was not at place where killing occurred. State produced impeaching witness who testified that defendant's witness had stated he was confident defendant did the shooting. Held, collateral issue because state could not have introduced the testimony as part of state's case, and admission of testimony was reversible error, Ware v. State, 110 So. 503, **Miss.**

WORKMEN'S COMPENSATION

A dependent infant sister of deceased, held a "child" within the meaning of Compensation Act. Faulkner v. Owners of Ship Sutton, 1927, 1 K. B. 207, **English.**

Burden is on workmen's compensation insurer to prove that injury was induced by inherent or congenital weakness of employee and not to accident arising out of employment. Zurich General Accident & Liability Ins. Co. v. Brunson, 15 **F.** (2d) 906.

Where employee, clearing land on precipitous mountain, while seated on mountain side to eat noon lunch, accidentally cut his leg with knife, in attempting to cut a twig, and in replacing boot after examining injury lost his balance and fell into fire, held that injury was received in course of his employment. Zurich General Accident & Liability Ins. Co. v. Brunson 15 **F.** (2d) 906.

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The references to legal periodicals are by volume and page, except where otherwise indicated. Thus, 39 Harv. L. R. 82-100, refers to volume 39, page 82 of the Harvard Law Review. The length of the article is indicated by the page numbers. Thus, the article referred to is 19 pages long, covering pages 82 to 100, inclusive.

The abbreviations used (other than conventional) are as follows:

Am.—American.
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C. L. J.—Central Law Journal.
J.—Journal.
L.—Law or Legal.
Q.—Quarterly
R.—Review.
Reg.—Register.
Rep.—Reporter.
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That dredge at canal bank caused earth to fall and make displacement wave, which raised steamer, and then let it fall and strike submerged pile, held not alone proof of negligence. W. H. Gahagan, Inc. v. Tucker Stevedoring Co., 15 F. (2d) 936, Del.

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